United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1004

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NOS. 75-1004, 75-1008

UNITED STATES OF AMERICA,

Appellee,

against

ANTHONY M. NATELLI AND JOSEPH SCANSAROLI,

Defendants-Appellants.

PETITION ON BEHALF OF APPELLANT JOSEPH SCANSAROLI FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

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TABLE OF AUTHORITIES

	PAGE
Anderson v. *United States*, 417 U.S. 211 (1974)	3, 6, 7
Henry v. *Mississippi*, 379 U.S. 433 (1965)	7
Staub v. *Baxley*, 355 U.S. 313 (1958)	3
Steinhauser v. *Hertz Corp.*, 421 F.2d 1169 (2d Cir. 1970)	3
Street v. *New York*, 394 U.S. 576 (1969)	2
Stromberg v *California*, 283 U.S. 359 (1931)	2
United New York and New Jersey Sandy Hook Pilots Ass'n v. *Halecki*, 358 U.S. 613 (1959)	2
United States v. *Bryant*, 461 F.2d 912 (6th Cir. 1972)	9
United States v. *Byrd*, 352 F.2d 570 (2d Cir. 1965)	9
United States v. *Driscoll*, 449 F.2d 894 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972)	2
United States v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962)	9
United States v. *Goldstein*, 168 F.2d 666 (2d Cir. 1948)	2, 3
United States v. *Guterma*, 281 F.2d 742 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960)	2
United States v. *Lefkowitz*, 284 F.2d 310 (2d Cir. 1960)	3, 6
United States v. *Love*, 472 F.2d 490 (5th Cir. 1973)	3, 7
United States v. *Mascuch*, 111 F.2d 602 (2d Cir.), *cert. denied*, 311 U.S. 650 (1940)	2, 3
United States v. *Pui Kan Lam*, 483 F.2d 1202 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974)	6
United States v. *Ragland*, 375 F.2d 471 (2d Cir. 1967)	10
United States v. *Terrell*, 474 F.2d 872 (2d Cir. 1973)	9

PAGE

United States v. *Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974) 6

United States v. *Zane*, 495 F.2d 683 (2d. Cir.), *cert. denied*, 419 U.S. 895 (1974) 10

Vitello v. *United States*, 425 F.2d 416 (9th Cir.), *cert. denied*, 400 U.S. 822 (1970) 2

Yates v. *United States*, 354 U.S. 298 (1957) 2

PETITION ON BEHALF OF APPELLANT JOSEPH SCANSAROLI FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

On July 28, 1975, a panel of this Court (Hays, Mulligan and Gurfein, *J.J.*) reversed Scansaroli's conviction on the ground that the evidence as to one of the two specifications in the single count submitted to the jury was legally insufficient and, therefore, the jury's verdict was impermissibly ambiguous (Slip Op. 5165). On October 6, the panel withdrew its prior determination and affirmed the conviction, despite the acknowledged insufficiency, on the ground that Scansaroli did not move "to withdraw the . . . specification from consideration by the jury." (Slip Op. 6297, 6298.)

In this Petition, Scansaroli raises only certain issues argued to the panel, issues that meet the standard for rehearing *in banc:* Consideration of the full Court is necessary to secure or maintain uniformity of its decisions and because the questions presented are of exceptional importance.[1]

I

The panel affirmed an ambiguous verdict of conviction knowing that the jury may have relied solely upon a specification on which Scansaroli was entitled to a directed verdict (Slip Op. 5191). This result is contrary to pertinent authority and unprecedented in American jurisprudence. We have been unable to locate even a single reported decision of a federal court upholding a conviction so founded on legally insufficient evidence.

As the panel recognized, where a jury may have convicted on an unproved specification, a new trial should be granted. *Yates* v. *United States,* 354 U.S. 298, 312 (1957): "[W]e think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on

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[1] In addition to the reasons for reversal set forth in this Petition, Scansaroli joins in the arguments made by appellant Natelli and Peat, Marwick, Mitchell & Co. (*amicus curiae*), whose Petitions for Rehearing are pending before this Court.

another, and it is impossible to tell which ground the jury selected." See also, *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1930); *Street* v. *New York*, 394 U.S. 576, 585-86 (1969).[2]

Without questioning this well-established principle, and holding that the evidence with respect to one of the two specifications was insufficient, the panel ruled that the point had not been preserved for appeal because no "separate motion was made by Scansaroli to withdraw the earnings statement specification from consideration by the jury" (Slip Op. 6298), citing two early decisions which predated *Yates* and could not have considered its teaching: *United States* v. *Mascuch*, 111 F.2d 602 (2d Cir.), *cert. denied*, 311 U.S. 650 (1940), and *United States* v. *Goldstein*, 168 F.2d 666 (2d Cir. 1948).

The panel's adherence to what it labelled the *Mascuch-Goldstein* rule overlooked at least two fundamental differences between those decisions and the present appeal. First, in neither *Mascuch* nor *Goldstein* was there any determination that any of the specifications submitted to the jury rested on legally insufficient evidence. Indeed, in *Mascuch*, this Court considered the assertedly unproved specifications and concluded "that no error was committed in submitting **all** of them to the jury's consideration. . . . The proof . . . showed the appellant to be guilty of perjury in respect to **each** of the assignments, or at least it was sufficient to support such a finding by the jury." 111 F.2d at 603.[3] The *Mascuch-Goldstein* language concerning the

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[2] This principle has not been limited, as the government suggested in its Petition for Rehearing (pp. 7-8), to cases involving constitutionally invalid statutes. *Vitello* v. *United States*, 425 F.2d 416, 419 (9th Cir. 1970): [T]he teaching of [*Yates*] should be here applied if we find . . . that there was insufficient evidence to be submitted to the jury on any one or more of the specifications of falsity. . . ." *United States* v. *Guterma*, 281 F.2d 742, 747 (2d Cir. 1960): "[T]he two transactions were submitted to the jury together and we cannot know whether their verdict was based solely on the UFITEC transaction or in part or solely on the Judson Commercial sale." See also, *United N.Y. & N.J. Sandy Hook Pilots Ass'n.* v. *Halecki*, 358 U.S. 613, 619 (1959); *United States* v. *Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971).

[3] Emphasis has been added throughout this Petition.

need for a specific motion to withdraw a specification was therefore unnecessary to both decisions. Such dicta hardly overcome the applicability of the **holding** in *Yates* when evidence is found to be insufficient to go to the jury (Slip Op. 5165, 6298) and the ensuing verdict is unquestionably ambiguous.

The second critical difference is that neither *Mascuch* nor *Goldstein* contains the barest hint that the trial court was aware of the appellant's position or that a separate motion to withdraw a specification would **not** have been a fruitless exercise.

Here, however, the trial court was plainly aware of Scansaroli's position that the second specification had not been proved. Moreover, the motion the panel held should have been made would have been pointless because, as shown below, the trial court in fact ruled on sufficiency and denied a specific motion to strike the unproved specification.

The purpose of the rule requiring specific motions is to prevent reversals based on errors the trial court might have corrected if the matter had been brought to its attention. *Steinhauser* v. *Hertz Corp.*, 421 F.2d 1169, 1173 (2d Cir. 1970). But once the trial court is aware of the matter, slavish adherence to formalistic technicalities amounts to "resort to an arid ritual of meaningless form." *Staub* v. *Baxley*, 355 U.S. 313, 320 (1958). See also, *United States* v. *Love*, 472 F.2d 490, 496 (5th Cir. 1973); *United States* v. *Lefkowitz*, 284 F.2d 310, 313, n.4 (2d Cir. 1960): "We do not regard the failure of Dryja's counsel to except as barring Dryja from seeking reversal for error in the charge: Lefkowitz's exception called the matter to the judge's attention and **further exception would have been fruitless.**"

Perhaps most directly in point is *Anderson* v. *United States*, 417 U.S. 211 (1974), cited by Scansaroli in reply to the government's Petition, but not even mentioned by the panel. There, the petitioners before the Supreme Court argued the insufficiency of the trial evidence. Noting that the issue had not been raised "with any particularity" in either the trial court or the Court of Appeals, nor even in the petition for certiorari, the Supreme Court ruled that since the "gist" of other arguments

raised the "substance" of the sufficiency issue, the interests of justice required consideration of the sufficiency of the evidence:

> It seems clear . . . that this issue was presented neither to the Court of Appeals nor to us in the petition for a writ of certiorari. As indicated earlier, the § 241 question arose below **only with respect to the admissibility of [certain] testimony** . . . and not in connection with any claim that the evidence was insufficient to support a verdict under the statute. **We nevertheless consider the sufficiency-of-the-evidence claim here.** We recognize that petitioners did raise before both the District Court and the Court of Appeals, and in the petition for a writ of certiorari a claim that the indictment was unconstitutionally vague, and **the gist of their argument . . . raised the substance of petitioner's present contention that the evidence was insufficient.** . . . Moreover, as we have had occasion to note, a claim that a conviction is based on a record lacking any evidence relevant to crucial elements of the offense is a claim with serious constitutional overtones. See, e.g., Thompson v Louisville, 362 US 199, 4 L Ed 2d 654, 80 S Ct 624, 80 ALR2d 1355 (1960); Johnson v Florida, 391 US 596, 20 L Ed 2d 838, 88 S Ct 1713 (1968). See also Adderly v Florida, 385 US 39, 44, 17 L Ed 2d 149, 87 S Ct 242 (1966). Accordingly, **even though the sufficiency-of-the-evidence issue was not raised below with any particularity, we think the interests of justice require its consideration here.** See Screws v United States, 325 US 91, 107, 89 L Ed 1495, 65 S Ct 1031, 162 ALR 1330 (1945) (opinion of Douglas, J.). Cf. Lawn v United States, 355 US 339, 362 n 16, 2 L Ed 2d 321, 78 S Ct 311 (1958). 417 U.S. at 223, n.12.

Here, too, where Scansaroli challenged the admissibility of the evidence underlying the specification and where the gist of his arguments clearly raised the sufficiency issue, the interests of justice require consideration and analysis of the record, which was brought to the panel's attention in our briefs on appeal and in our responses to the government's Petition, but is not even mentioned in

the panel's opinion. At the very least—and, as a matter of law, that is enough—the record reveals the trial court's awareness of the substance of Scansaroli's position that there was insufficient evidence to support the second specification.[4]

At the close of the government's case, Natelli, Scansaroli's co-defendant, explicitly moved to strike the very specification that the panel found not to have been proved against Scansaroli. Natelli's counsel referred to the Eastern contract, the Oberlander work-papers, and Scansaroli's conversations with Kurek, arguing that the evidence was insufficient. The trial court denied the motion with respect to both Natelli and Scansaroli:

> The whole point is, the Government wants to argue, and I think they can fairly from evidence in the case, that this was less than an honest effort and that Kurek **and Scansaroli** well knew by that time it was less than an honest effort.
>
> Again, I understand you, but I don't think the Judge should dismiss when **there is evidence which could convince a reasonable jury** to the contrary of what you are saying. (T.1322.)

Moments later, when Scansaroli moved to dismiss the count for insufficiency, the trial court had just ruled on the second specification; referring to the denial of Natelli's motion, the trial court denied Scansaroli's as well:

> Well, again, as I observed to [Natelli's counsel], I am well aware in addition to the matters you pointed to there are other matters which a fact finder could consider very much in favor of Mr. Scansaroli, but the inquiry here is somewhat more limited. **I believe there is evidence** from the Government's point of view . . .

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[4] It should be noted that the single count against Scansaroli contained only two specifications, and that the second, which the panel held should not have been submitted to the jury, received considerable attention during the trial. Indeed, the prosecutor thought the second specification so significant that he dwelt upon it at length and in inflammatory fashion in his summation; for example, he likened the key event, a conversation at Pandick Press in which Scansaroli did not participate (Slip Op. 5184), to a "doctor at three o'clock in the morning down in his cellar burying a fresh corpse" (T.2285-86; See also, T.2268, 2295, 2296, 2304).

> **which might convince a reasonable jury** that Scansaroli, well aware of what was going on, participated in this affair with an intent to defraud as the Government has claimed to this jury it will prove. And **I think that's sufficient** under the legal tests now pertinent in our circuit, so with all due respect, **I deny your motion and plan to put the case to the jury.** (T. 1337-38.)

This record is precisely analogous to *United States* v. *Lefkowitz, supra,* where Lefkowitz had taken exception, but his co-defendant had not. As Judge Friendly held, "further exception would have been fruitless." 284 F.2d at 313, n.4.[5]

Moreover, the trial court made its ruling with the clear understanding that Scansaroli's position with respect to Eastern was that—as the panel found—**it had nothing to do with him** and thus could not conceivably be sufficient. (See T.1339, where the trial court, over vigorous objection, ruled the Eastern matter **admissible** against Scansaroli—the same issue the defendants raised at trial in *United States* v. *Anderson, supra,* 417 U.S. at 223, n.12—notwithstanding this awareness.)[6]

After trial, this awareness of Scansaroli's contention was expressed once again, when the trial court stated his feeling that what the jury considered against Scansaroli had "certainly nothing to do with what went on the night at Pandick . . ." (A.255-56).

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[5] The government argued (Petition for Rehearing, pp. 10-11, n.) that by proceeding to put in a defense, both defendants **waived** their sufficiency arguments, citing *United States* v. *Tramunti,* 500 F.2d 1334 (2d Cir.), *cert. denied,* 419 U.S. 1079 (1974) and *United States* v. *Pui Kan Lam,* 483 F.2d 1202 (2d Cir. 1973), *cert. denied,* 415 U.S. 984 (1974). Neither stands for that proposition. Both merely held that if the defense proceeds after denial of a sufficiency motion, sufficiency will thereafter be determined in light of the evidence presented not only by the government but also by the defense. Here, the panel's finding of insufficiency was based on **all** the evidence and conclusively resolved this argument against the government.

[6] Of course, the erroneous admission of the Eastern matter, along with the erroneous admission of other unconnected and irrelevant evidence, furnished a separate ground for reversal which the panel declined even to discuss (see point II, *infra*).

There is simply no room for doubt that if Scansaroli had made a separate "motion to withdraw the second specification from consideration by the jury"—after such a motion had already been denied once and after the Eastern evidence had been received, in spite of the fact that Scansaroli wasn't "privy to that conversation" (T.1339)—the trial court would have denied the motion.

In fact, this is precisely what the government argued in its Petition (p. 12, n.): "The net of this is that, had the issue been properly raised by Scansaroli below, the trial court could have had an opportunity to make a finding . . . which, if not one of aiding and abetting, would have at the very least been one of culpability. . . ."

Thus, while the government contended that no separate motion was made, it concedes—indeed, argues—that had a separate motion been made, it would have been denied. We agree. A separate motion would have been "an arid ritual of meaningless form."[7]

We respectfully submit that the panel's affirmance of this conviction, which may have been based solely on legally insufficient evidence, on the ground that "a useless formality" was not observed, constitutes "a gross miscarriage of justice." *United States* v. *Love, supra,* 472 F.2d at 496. Indeed, as suggested by the Supreme Court in *Anderson* v. *United States, supra,* a conviction which may have been based solely on insufficient evidence is tantamount to a conviction based on no evidence at all and constitutes a most serious deprivation of constitutionally prescribed due process.

Every statement of the purposes and intent of our judicial system—in every opinion and from every podium—reaffirms our pursuit of substantial justice. Why now do we turn back to the hypertechnical approach of the dark ages? Why now do we convict a man on insufficient evidence? To protect the right of a trial judge to rule on a point which he did, in fact, rule on? Does it satisfy sub-

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[7] The government's gratuitous speculation, implicitly adopted by the panel, that counsel may have refrained from making the motion as a matter of "strategy" is clearly "an insufficient basis" for holding that Scansaroli waived the deficiency. *Cf. Henry* v. *Mississippi,* 379 U.S. 443, 450 (1965).

stantial justice to answer that the motion was made by one counsel and not the other? Or that while the trial judge was aware of the issue, counsel failed to utter the sacred words, to observe the hallowed ritual? If so, we must all stand convicted on Ogden Nash's indictment:

> The law is so in love with the law
> It's forgotten common sense.

II

Two other issues, neither of which was discussed by the panel, also merit consideration by the full court: the trial court's absolute refusal to define "aiding and abetting" for the jury and the erroneous admission of irrelevant hearsay against Scansaroli.

1. The panel concluded that the evidence was legally insufficient on the **second** specification in part because it found that "rejection of the Eastern contract was not within [Scansaroli's] sphere of responsibility" and that Natelli, Scansaroli's superior, was the only one who could "make the judgment" (Slip Op. 5184). At trial, and on appeal, we argued that Scansaroli was in the same position vis-à-vis Natelli with respect to **both** specifications: Scansaroli had no more "responsibility" for the form in which the footnote appeared (the crux of the first specification) than he did for the inclusion or exclusion of Eastern.

While the panel explicated no distinction between the two specifications, it found the evidence sufficient on the first because Scansaroli "**participated** in the decision" reflected in the footnote and because "[e]ven if Scansaroli did not write the footnote, he **supplied**" the computations (Slip Op. 5183). Put in more familiar terms, the panel did **not** find that Scansaroli **made** the false statement or **caused** it to be made, but that he **aided and abetted** its making.

Given this conclusion, the panel's failure to discuss the trial court's refusal to define aiding and abetting for the jury is simply incomprehensible.

The government's theory of the case was that Natelli and Scansaroli were aiders and abettors (T.1340, 1342: The Court: "[Y]our contention is that the two defendants here on trial were aiding and abetting . . . ?" The Prosecutor: "Absolutely." See also, Gov't Brief, p. 84). Both the government and the defense sought definitions of aiding and abetting in their requests to charge (Gov't Request No. 10, A.152-53; Scansaroli Requests Nos. 17, 21, 22, A.234, 239-40). The trial court twice instructed the jury that it could convict on a finding of "aiding and abetting" (T.2341, 2372-73). And Scansaroli excepted to the failure of the trial court to read the statute or otherwise define that term (T.2387).

The trial court, however, in his own words, refused to "go into the **clankety, clankety, clankety** which is customarily done . . ." (T. 2387).

Time and again, this Court has reversed convictions for failure to define adequately the legal principles applicable to aiding and abetting. *United States* v. *Terrell,* 474 F.2d 872 (2d Cir. 1973); *United States* v. *Byrd,* 352 F.2d 570 (2d Cir. 1965); *United States* v. *Garguilo,* 310 F.2d 249 (2d Cir. 1962). See also, *United States* v. *Bryant,* 461 F.2d 912 (6th Cir. 1972). Here, there was not merely a faulty definition, there was no definition at all. The panel thus simultaneously affirmed Scansaroli's conviction, based on legally insufficient evidence, because of the omission of particular words at a particular time, even though they would have been fruitless, yet completely overlooked the trial court's relegation of crucial legal principles to the "clankety, clankety, clankety" of the scrap heap.

2. In our main brief on appeal (pp. 30-33) and in our reply brief (pp. 21-23), we demonstrated the trial court's error in admitting evidence against Scansaroli that was never connected to him and was therefore both irrelevant and hearsay. The panel did not address this issue.

The trial court admitted the challenged evidence on the novel theory that Scansaroli's mere **employment** by Peat, Marwick, Mitchell & Co. was sufficient connection (T. 1162-63). This, of course, does not begin to meet the threshold

requirements for admissibility enunciated by this Court: "illicit association", *United States* v. *Ragland,* 375 F.2d 471, 477 (2d Cir. 1967), or "joint criminal undertaking", *United States* v. *Zane,* 495 F.2d 683 (2d Cir.), *cert. denied,* 419 U.S. 895 (1974). Indeed, the trial court found no such criminality (T. 1162-63) and the evidence, received (over objection) to prove knowledge that Scansaroli never had, should have been excluded. Its admission constituted clear error and warrants reversal of the conviction.

Conclusion

For the reasons set forth above, this petition for rehearing should be granted, and rehearing should be *in banc.* The panel's opinion should be vacated and Scansaroli's conviction reversed.

Respectfully submitted,

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Dated: New York, New York
October 20, 1975